

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78- **523**

WILLIE BAILEY, et al.,

Appellants,

v.

J. CLAYTON HARGROVE, etc., et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-

WILLIE BAILEY, ROBERT HARGROVE, GEORGE W. THOMPKINS, and WALTER DANIEL, individually and on behalf of all those similarly situated,

Appellants,

versus

J. CLAYTON HARGROVE, individually and in his official capacity as Judge of the Probate Court of Putnam County; JEFF A. MADDOX, JR., BETTY HARPER, AMELIA LOGAN, ANDREW SADDLER, and FRANK J. CARNES, individually and in their official capacities as members of the Putnam County Board of Education,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from the Order of the United States District Court for the Middle District of Georgia, sitting as a

court of three judges, entered on June 28, 1978, which held that Georgia Laws 1962, p. 776 does not fall within the coverage of §5 of the Voting Rights Act of 1965.

OPINION BELOW

The opinion of the United States District Court for the Middle District of Georgia dated June 28, 1978 is unreported and is appended hereto at 1a.

JURISDICTION

This action was brought under the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and the following provisions of the United States Code: 28 U.S.C. §§1331, 1343(3) and (4), 2201, 2281, and 2284; and 42 U.S.C. §§1973c and 1983.

Plaintiffs filed this class action on December 23, 1976, to enforce §5 of the Voting Rights Act of 1965, in selecting members of the Putnam County,

Georgia, Board of Education.[1] A statutory three-judge district court was convened and it held on June 28, 1978, that Georgia Laws 1962, p. 776 did not fall within the preclearance requirements of §5. Notice of appeal was filed on July 28, 1978, and is appended hereto at 12a.

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C.. §1253 and 42 U.S.C. §1973c. Allen v. State Board of Election, 393 U.S. 544 (1969).

STATUTORY PROVISIONS INVOLVED

This appeal presents a question as to whether election changes enacted prior to November 1, 1964, but not to become

1. Plaintiffs, black registered voters of Putnam County, also sought declaratory and injunctive relief against the use of at-large elections for the members of the Board of Education, the Putnam County Board of Commissioners, and the Eatonton, Georgia, City Council, on grounds that such election schemes unconstitutionally diluted minority voting strength. These issues are for a single judge court and are presently pending. Furthermore, plaintiffs raised other claims under §5 of the Voting Rights Act of 1965 before the three-judge court, but no other §5 issue is raised in this appeal other than the one arising under Georgia Laws 1962, p. 776.

effective until November 3, 1964, are subject to the preclearance requirements of §5. The validity of the state law is not at issue. The state law, Georgia Laws 1962, p. 776, and 42 U.S.C. §1973c are appended hereto at 14a and 19a respectively.

QUESTIONS PRESENTED

I. Whether §5 of the Voting Rights Act of 1965, which governs state election procedures "different from [those] in force or effect on November 1, 1964," covers changes enacted prior to that date but which under state law were not and could not have been in force until after that date?

II. Whether the district court misapplied this Court's holding in Perkins v. Matthews, 400 U.S. 379 (1971), in ruling that a state law enacted prior to November 1, 1964 but which did not go into effect until November 3, 1964, was not governed by §5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

This case involves the coverage of §5 of the Voting Rights Act of 1965. Appellants sought, among other things, declaratory judgment that Georgia Laws 1962, p. 776 constituted changes in election standards, practices and procedures within the coverage of §5 and injunctive relief against the use of those changes until appellees obtained administrative or judicial preclearence pursuant to 42 U.S.C. §1973c.

Article VIII, Sec. 5, Para. 1, of the 1945 Constitution of the State of Georgia provided that various boards of education would be composed of five members, selected by the grand jury. Paragraph 2 of the same article and section of the 1945 Constitution provided that the manner of selecting members of a board of education could be changed by a local constitutional amendment if ratified by a majority of the registered voters of the jurisdiction in a referendum vote.

Georgia Laws 1962, p. 776 is a local constitutional amendment that changed the

manner of selecting members of the Putnam County Board of Education from appointment by the grand jury to at-large elections. Numbered post and majority vote requirements were also implemented. 15a. The local constitutional amendment was enacted by the Georgia legislature in 1962, and was ratified by the voters on November 6, 1962.

There is no question that this statute was a "change" of the type covered by §5. The only issue is whether or not it is "covered" by the Act, i.e., whether it was in force or effect on or prior to November 1, 1964. By its express terms, Georgia Laws 1962, p. 776 was not to become effective until the general election in 1964.[1]

Before the district court, appellees incorrectly contended that had an election been held on November 1, 1964, the provisions of Georgia Laws 1962, p. 776 would have been utilized. (Memorandum in Support of Proposed Orders by Defendant, Putnam County Board of Education, p. 2.)

1. In 1964 the general election in Putnam County, Georgia, was held on November 3, 1964, the same day as that year's federal election.

On June 28, 1978, the district court ruled that Georgia Laws 1962, p. 776 did not fall within the coverage of §5 because it was in force or effect prior to November 1, 1964.

On July 12, 1978, appellants filed a motion for relief from the June 28, 1978 order of the district court, pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure. The district court never ruled on that motion.

On July 28, 1978, appellants filed their notice of appeal from the June 28, 1978 order.

THE QUESTIONS ARE SUBSTANTIAL

I. REVIEW IS REQUIRED BECAUSE THE DISTRICT COURT MISAPPLIED PERKINS V. MATTHEWS, 400 U.S. 379 (1971), WHICH GOVERNS THIS CASE, AS THE DISTRICT COURT ACKNOWLEDGED.

In Perkins v. Matthews, 400 U.S. 379 (1971), this Court ruled that in determining whether a change in voting standards, practices and procedures falls within the coverage of §5's preclearance requirements:

> §5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date. Id., 400 U.S. at 394.

Here the district court properly acknowledged that the Perkins test was applicable to this case. However, the district court then reasoned that:

> The amendment providing for election of this board of education after its enactment by the legislature in 1962, and its ratification by the voters in November, 1962 was complete in every respect, and the first election was then scheduled for November, 1964, on the Tuesday following the first Monday. If that election had been held a few days earlier on November 1, it would have been held pursuant to this amendment and the same way it was actually held that November on the Tuesday following the first Monday. 7-8a.

The district court was correct that if the general election had been held on November 1, 1964, Ga. Laws 1962, p. 776 would have governed the election of members of the Putnam County Board of Education. But under Georgia law, no "general election" could have been held on November 1, 1964.

Ga. Code §§34-103(h) and (m) and 34-802 and the 1945 Constitution of the State of Georgia, §2-1602.[1] Thus, by its terms Ga. Laws 1962, p. 776 would not come into force until the 1964 "general election," and as noted supra, under Georgia law, the 1964 "general election" could not lawfully have been held until November 3, 1964.

The district court misapplied Perkins by confusing the hypothetical test used in Perkins with the realities of state law.

---

1. The 1962 constitutional amendment at issue here, Ga. Laws 1962, p. 776, provides that it shall first be applicable "at the general election in 1964." The Georgia Code provided that all county officers [including those at issue here] are to be elected at the "November election." Ga. Code §34-802. Both Ga. Code §34-103(h) and (m) and the 1945 Constitution of the State of Georgia, §2-1602, provide that the "November election" shall be held on the Tuesday next following the first Monday of November in even numbered years. Accordingly, in no year could the "general election" be held earlier than November 2, and in 1964 it could not be held until November 3. Thus, under state law, Ga. Laws 1962, p. 776 could not have been in force until November 3, 1964.

The purpose of the hypothetical test used in Perkins was to determine what law would have applied if an election had been held on November 1, not to presume, in contravention of state law, that an election would have been held on November 1, 1964. As noted under Georgia law, the 1964 general election could not lawfully have been held on November 1. The hypothetical test used in Perkins does not require the lower courts to disregard state law, and the district court erred in doing so.

Perkins made clear that the lower courts were not to disregard state law in determining what law was "in force or effect on November 1," when this Court stated that "we presume that officials will act in accordance with law." Id., 400 U.S. at 394. In accepting appellees' contentions that Ga. Laws 1962, p. 776 would have been utilized on November 1, 1964, the district court manifestly presumed that local officials

would have disregarded state law.[1] Under Perkins, it was unwarranted for the district court to do so.

II. THE DISTRICT COURT'S RULING SUBVERTS THE INTENT OF CONGRESS IN FRAMING §5 OF THE VOTING RIGHTS ACT OF 1965.

Congress enacted the Voting Rights Act on August 6, 1965. Nevertheless, the Congress chose November 1, 1964 as the trigger date for §5's preclearance requirements. It is obvious, therefore, that in doing so Congress intended to bring within the coverage of §5 all election changes that were employed for the first time

1. None of the appellees held office on November 1, 1964. Therefore their bare representations to the district court that Ga. Laws 1962, p. 776 would have been implemented in an election on November 1, 1964 cannot be regarded as evidence of what officials in office at that time would actually have done. As importantly, acceptance of appellees' argument that local officials can escape §5 coverage if they represent that they would have violated state law is an invitation to evasion of the Voting Rights Act of 1965.

in the November 3, 1964 general election. Clearly, Georgia Laws 1962, p. 776 provided for just such election changes.

This Court has stated that §5 is to be given "the broadest possible scope." Allen v. State Board of Elections, 393 U.S. 544, 567 (1969). The ruling of the district court, however, substantially restricts the reach of federal scrutiny under §5. Specifically, the holding of the district court means that election changes employed for the first time in the general election in 1964 are not within §5's coverage, so long as the enacting legislation became law by November 1, 1964. Congress used the terms "in force or effect on November 1, 1964." It applies whenever a State "shall enact or seek to administer" any standard, practice or procedure different from those in force or effect on that date. The use of the disjunctive clearly means it is not sufficient to merely enact a change for coverage to be avoided; it must be "in force or effect" as well prior to the trigger date.[1]

1. The speculation employed by the district court could be applied to any state election statute enacted prior to November 1, 1964, though effective subsequent thereto. It was manifestly
(Footnote continued on next page)

It is respectfully submitted that the reasoning by the district court clearly subverts the Congressional intent, as manifested by its choosing the November 1, 1964 trigger date, and the clear language of the Act, to reach election changes employed for the first time in the 1964 general election.

III. THE RULING OF THE DISTRICT COURT IS IN DIRECT CONFLICT WITH THE RULING OF THE THREE-JUDGE COURT IN UNITED STATES V. GEORGIA, WHICH THIS COURT HAS SUMMARILY AFFIRMED.

United States v. Georgia, Civ. No. C76-1531A (N.D.Ga. September 30, 1977), aff'd, ___U.S.___, 98 S.Ct. 2840 (1978),[1] also considered the applicability of §5 to changes in Georgia election procedures enacted prior to November 1, 1964 but which were not to go into effect until after that date. In that case the State argued before the three-judge court that changes in Georgia election laws enacted

(Footnote continued from preceding page)
erroneous to so speculate regarding a statute which by its own terms forbade its use prior to the 1964 general election.

1. This unreported opinion is appended hereto at 23a.

in June, 1964 were exempt from the preclearance requirements of §5 even though they would not go into effect until after November 1, 1964. In a holding essential to its judgment in that case, the district court rejected the contention that the date of enactment determined the applicability of §5, stating that:

> [A] change in election procedure passed prior to the act but effective after the act would constitute a change within the meaning of the act. Consequently, the State's argument that no preclearance was necessary for the complained of sections must fail.
> Id., slip opinion, p. 4. 28a.

This Court summarily affirmed. ___U.S.___, 98 S.Ct. 2840 (1978).

Thus, not only are the decisions of two three-judge courts in Georgia in conflict on the proper application of §5 in this setting, but this Court's affirmance of another three-judge court determination is in conflict with the determination of the lower court. Plenary review is merited on both grounds. See, Hicks v. Miranda, 422 U.S. 332 (1975).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIE BAILEY, ET AL., Plaintiffs, vs. ROY L. VINING, JR., individually and in their capacity as members of the Board of Commissioners for Putnam County, Georgia, et al., Defendants.	:	CIVIL ACTION NO. 76-199-MAC [Filed June 28, 1978]

Before MORGAN, Circuit Judge, BOOTLE, Senior District Judge, and OWENS, District Judge.

OWENS, District Judge:

The court having determined that no factual issues as to questions to be decided by this court of three judges are in dispute and having considered the evidence, briefs and argument of counsel does hereby dispose of all three judge issues as follows:

I. THE PUTNAM COUNTY BOARD OF EDUCATION

The 1945 Constitution of the State of Georgia was amended by an act of the legislature, 1962 Ga. Laws, p. 776, ratified by the voters of the entire state [sic; Putnam County] in November 1962, to provide for a publicly elected board of education to take the place of a board of education whose members were appointed by the grand jury. Petitioners urge that since the first election of these school board members did not take place until after November 1, 1964, this constitutional amendment was covered by the Voting Rights Act and cannot be further utilized until the Voting Rights Act is complied with. Defendants to the contrary say that the procedure of electing rather than appointing this board of education was in force and effect on November 1, 1964, and the election of November, 1966 [sic; November 3, 1964]--the first election under the Act--is not a change. Accordingly, they say this amendment is not covered by the Voting Rights Act.

Title 42 U.S.C.A. §1973c, the Voting Rights Act, provides:

"Whenever a State or political subdivision. . .shall enact or seek to administer any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . .such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty day after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."
(emphasis added).

The words "any action under this section shall be heard and determined by a court of three judges. . ." have been construed to mean that a court of three judges must determine whether or not a particular amendment, law, standard, practice, or procedure is covered by the Voting Rights Act. The further question of whether or not a covered amendment, law, standard, practice or procedure "does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color' . . ." is expressly reserved for decision by the Attorney General or the United States District Court for the District of Columbia. Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971).

The Supreme Court in Perkins v. Matthews, supra, considered whether or not a Mississippi statute enacted in 1962 to change municipal elections from ward to at-large which was ignored by the City of Canton in conducting its 1965 elections had to be submitted by the City of Canton to be used for elections in 1969 and subsequent years. Note what the court said:

> "We have concluded, nevertheless, that the change to at-large elections

required federal scrutiny under §5. That section in express terms reaches any standard, practice, or procedure 'different from that in force or effect on November 1, 1964.' In our view §5's reference to the procedure 'in force or effect on November 1, 1964,' must be taken to mean the procedure that would have been followed if the election had been held on that date. That judgment is necessarily a matter of inference in this case since Canton did not hold a municipal election on November 1, 1964. But in drawing that inference, there is little reason to blind ourselves to relevant evidence in the record by restricting our gaze to events that occurred before that date. Ordinarily we presume that officials will act in accordance with law. See First National Bank of Albuquerque v. Albright, 208 US 548, 553, 52 L Ed 614, 616, 28 S Ct 349 (1908). If the only available facts showed that Canton conducted its 1961 election by wards but that the Mississippi Legislature had subsequently enacted a statute in 1962 requiring future municipal elections to be held at large, Canton officials would be entitled to the weight of that presumption.

"With the benefit of hindsight, however, we know that Canton elected its aldermen by wards in its June 1965 municipal election. The record reflects no relevant change between

"Whenever a State or political subdivision. . .shall enact or seek to administer any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . .such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure, Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall be a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be herad and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."
(emphasis added).

> November 1964 and June 1965 to suggest that a different procedure would have been in effect if the elections had been held seven months earlier. Consequently, we conclude that the procedure in fact 'in force or effect' in Canton on November 1, 1964, was to elect alderman by wards. That sufficed to bring the 1969 change within §5. As was the case in Allen, 'it is clear, however, that the new procedure with respect to voting is different from the procedure in effect when. . .[Canton] became subject to the Act. . . .' 393 US, at 570, 22 L Ed 2d at 19. The bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide." 400 U.S. at 394, 27 L.Ed.2d at 488, 91 S.Ct. at ___.

The amendment providing for the election of this board of education after its enactment by the legislature in 1962 and its ratification by the voters in November 1962, was complete in every respect, and the first election was then scheduled for November 1964 on the Tuesday following the first Monday. If that election had been held a few days earlier on November 1, it would have been held pursuant to this amendment and the same way it was actually held that November on the Tuesday following

the first Monday. The procedures "in force or effect" in Terrell County [sic; Putnam County] on November 1, 1964, was to thus elect this board of education pursuant to this amendment. The amendment having thus been "in force or effect" on November 1, 1964, it is not covered by the Voting Rights Act.

The legislature in 1972, by 1972 Ga. Laws, p. 2678, provided for staggered terms for members of the board of education with three members to be elected in 1972 for four year terms, two members to be elected in 1974 for two year terms and their successors to be elected on November of the last year of their respective terms. This law has not been submitted to the Attorney General or the District Court for the District of Columbia pursuant to the Voting Rights Act. Since any change different from that "in force or effect" on November 1, 1964, must be submitted, Allen v. Board of Elections, 393 U.S. 544 (1969), and if not submitted may not be used, this court must enjoin further use unless and until the Voting Rights Act is complied with. An election is scheduled for November 1978. The parties are invited to immediately and not later than

fifteen (15) days submit their suggestions as to an appropriate remedy.

II. THE CITY OF EATONTON

1970 Ga. Law, p. 2945; 1972 Ga. Laws, p. 3833; 1976 Ga. Laws, p. 3305, effected corporate annexations for the city. 1977 Ga. Laws, p. 3236, changed the number of aldermen, their terms of office and method of election. These all constitute changes subject to the Voting Rights Act which have not been submitted to the Attorney General or the District Court for the District of Columbia. Further use of these laws until the Voting Rights Act is complied with must be enjoined.

III. EATONTON TAX ASSESSORS

1970 Ga. Laws, p. 2945, provided for an appointed Board of Tax Assessors. Until the passage of that law the tax assessors were publicly elected. 1908 Ga. Laws, p. 620. Abolishing the right of all citizens to elect these officials does in this court's considered judgment constitute a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. . . ."

42 U.S.C. §1973c. This considered judgment is founded upon Allen v. Board of Elections, 393 U.S. 544, 569, to wit:

> "In No. 26 an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however the purpose of §5 was to submit such changes to scrutiny."

This law has not been submitted to the Attorney General or the District Court for the District of Columbia pursuant to the Voting Rights Act.

IV. GEORGIA ELECTION CODE PROVISIONS

Petitioners contentions that §§34-1002 and 34-1514 of the Georgia Election Code are unenforceable because of failure to comply with the Voting Rights Act have been decided adversely to petitioners. United States v. Georgia, Civil No. 76-153A, U.S. District Court for the Northern District of Georgia, affirmed without opinion, ___U.S.___, 46 U.S.L.W. 3750 (June 5, 1978).

Accordingly the parties to this action, their officers, agents, servants, employees, and attorneys, and all persons receiving actual notice of this order are hereby enjoined from directly or indirectly utilizing each of the statutes herein found to be covered by the Voting Rights Act and to have not been cleared pursuant to the Voting Rights Act, all until such time as the Voting Rights Act has been complied with.

Upon hearing from the parties the court will consider what further remedial action must be ordered as to 1972 Ga. Laws 2678 providing for staggered terms for the board of education.

SO ORDERED, this the 28th day of June, 1978.

s/Lewis R. Morgan
United States Circuit Judge

s/W.A. Bootle
United States District Judge

s/Wilbur D. Owens, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIE BAILEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil
v.	)	Action No.
	)	76-199-MAC
ROY L. VINING, JR., etc., et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs appeal to the Supreme Court of the United States from the portion of the order entered by the district court in this action on June 28, 1978, which held that the local constitutional amendment to the 1945 Georgia Constitution found at Ga.Law 1962, p. 776, is not a change in election standards, practices or procedures covered by the pre-clearance requirements of 42 U.S.C. §1973c.

This appeal is taken pursuant to 42 U.S.C. §1973c.

Respectfully submitted,

s/Christopher Coates

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PUTNAM COUNTY--BOARD OF EDUCATION

Proposed Amendment to the Constitution

No. 92 (House Resolution No. 260-701).

A Resolution.

Proposing an amendment to the Constitution so as to provide for the election of the members of the Board of Education of Putnam County by the people; to provide for the election of the Chairman of the Board of Education; to provide for the filling of vacancies on the Board; to provide for the submission of this amendment for rejection or ratification; and for other purposes.

Be it resolved by the General Assembly of Georgia:

Section 1. Article VIII, Section V, Paragraph I of the Constitution, relating to county boards of education, as amended, is hereby amended by adding at the end thereof the following:

"The Board of Education of Putnam County shall be composed of five (5) members. The Chairman and the four (4) other members of the Board shall be elected by the voters of the entire county. The five (5) memberships on the Board shall be

designated as post numbers 1 through 5 respectively. The individual elected to Post number 1 shall be the Chairman of the Board. Those candidates offering for election to the Board of Education of Putnam County shall specifically designate their intention of running for a particular post by number. To be elected to such post, the candidate must receive the highest number of votes cast and at the same time the candidate must receive a majority of the total votes cast toward filling such vacancy. Any vacancy occurring in the membership of the Board of Education of Putnam County, for any cause whatsoever, shall be filled by the majority vote of the remaining members of Board of Education.

"In the event this amendment is ratified, the members of the first Board of Education of Putnam County created under this amendment shall be elected at the general election held in 1964. The members elected at such election shall take office January 1, 1965, and shall serve for a term of four years and until their successors are elected and qualified. Future elections shall be held

every four years at the same time as elections for members of the General Assembly are held and the members elected shall take office on the first day of January immediately following the election. All future members shall likewise serve for a term of four years and until their successors are elected and qualified.

"The Board of Education in Putnam County in existence at the time of ratification of this amendment is hereby abolished December 31, 1964, and the terms of all members of such Board shall expire at that time.

"The Board of Education of Putnam County as provided for herein shall be subject to all constitutional and statutory provisions relative to county boards of education, unless such provisions are in conflict with the provisions of this amendment."

Section 2. When the above proposed amendment to the Constitution shall have been agreed to by two-thirds of the members elected to each of the two branches of the General Assembly, and the same has been entered on their journals with

the "Ayes" and "Nays" taken thereon, such proposed amendment shall be published and submitted as provided in Article XIII, Section I, Paragraph I of the Constitution of Georgia of 1945, as amended.

The ballot submitting the above proposed amendment shall have written or printed thereon the following:

"For ratification of amendment to the Constitution so as to provide for the election of members of the Board of Education of Putnam County by the people.

"Against ratification of amendment to the Constitution so as to provide for the election of members of the Board of Education of Putnam County by the people."

All persons desiring to vote in favor of adopting the proposed amendment shall vote for the ratification of the amendment, and all persons desiring to vote against the adoption of the proposed amendment shall vote against ratification.

If such amendment shall be ratified as provided in said Paragraph of the Constitution, it shall become a part of the Constitution of this State. The returns of the election shall be made in

like manner as returns for elections for members of the General Assembly, and it shall be the duty of the Secretary of State to ascertain the result and certify the result to the Governor, who shall issue his proclamation thereon.

42 U.S.C. §1973c

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with

respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard,

practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve

the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA:		
	:	CIVIL NO.
vs.	:	C76-1531A
	:	
THE STATE OF GEORGIA, et al.	:	[Filed September 30, 1977]

Before HILL, Circuit Judge; MOYE and O'KELLEY, District Judges

ORDER

PER CURIAM

This civil action is before the court on defendants' motion to dismiss or, in the alternative, for summary judgment and on plaintiff's motion for summary judgment. The United States Justice Department on September 17, 1976, filed an action in this court seeking an order requiring the State to submit two provisions of the Georgia Election Code of 1964 to the Attorney General of the United States for clearance pursuant to the Voting Rights Act of 1965, 42 U.S.C. §1971 et seq. The case was submitted to a three-judge panel, which determined that ruling should be postponed until after the general election and that a ruling should

be made based on cross motions for summary judgment. The case was set down for oral argument on April 28, 1977, and heard by the court at that time.

In the spring of 1964, the Georgia General Assembly in an extraordinary session completely revised the Georgia Election Code. The resulting bill, Act. No. 26, Ga. Laws 1964, p. 26 (Ga. Code Ann. 34-101 et seq.), was signed by the governor on June 24, 1964. The new election code provided at §34-1002 that candidates seeking one of two or more public offices, each having the same title and to be filled at the same election by vote of the same electors, would have to designate which specific office and post they were seeking within a given district. At §34-1514 the new code provided that a majority vote was required to nominate or elect in all elections within the purview of the election code. These two provisions contained a sentence which excluded candidates for election to the governing authority of a county from the requirement of designating a post and district and from the requirement of majority vote for the year 1964.

The Voting Rights Act of 1965, 42 U.S.C. §1971 et seq. [sic] became effective in August, 1965. The Act provided that in certain states and political subdivisions any change in the voting standard, function, or procedure after November, 1964, must be cleared by approval of the District Court for the District of Columbia or the Attorney General of the United States prior to its being put into effect. Georgia is a state covered by the Act. In the case sub judice, the Justice Department contends that the provisions in question, former Ga. Code Ann. §34-1002 and former Ga. Code Ann. §34-1514, were subject to the preclearance provisions of the Voting Rights Act of 1965 in that they constituted a change in voting procedure within the meaning of the Act. This reasoning is based on the argument that since these provisions of the Georgia Election Code did not go into effect until after November, 1964, they are subject to the Act even though the Georgia Election Code of which they are a part was enacted prior to the Voting Rights Act. The United States requests that the court declare that implementation of the changes to majority vote and designated posts in primaries

and elections for county governing bodies violates section 5 of the Voting Rights Act of 1965 and that the court enjoin defendants from emplementing [sic] the changes until the requirements of section 5 have been satisfied.

The State's motion to dismiss or, in the alternative, for summary judgment is based on three main arguments: (1) that the voting practices complained of were in force prior to November 1, 1964, and, consequently, not required to be submitted to the District Court for the District of Columbia or the Attorney General of the United States for approval prior to implementation; (2) that the provisions complained of have been repealed; and (3) that the provisions complained of were, in fact, properly submitted and approved by the Attorney General.

The argument that the provisions at issue did not constitute changes within the meaning of the Voting Rights Act in that they were part of an election code enacted prior to the passage of the Voting Rights Act has been dealt with by the Supreme Court of the United States in Perkins v. Matthews, 400 U.S. 379 (1971), in a slightly different factual setting. In Perkins the appellants, voters

and candidates for city office, sought to enjoin the 1969 city election in Canton, Mississippi, on the grounds that changes in election procedure and certain boundary changes since November, 1964, had not been precleared. Among the changes complained of was a change from election by ward to at-large election of aldermen. As the Court noted, the question of a change in this instance arose in a "peculiar context." The change had been enacted by a Mississippi statute of 1962 but had been ignored by the city in the election of 1965. The Court found that a belated implementation of the at-large election of aldermen requirement in the 1969 election would constitute a change within the meaning of the Voting Rights Act of 1965:

> We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under §5. That section in express terms reaches any standard, practice or procedure "different from that in force or effect on November 1, 1964." In our view, §5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date.

Id. at 394. It seems clear that if the

Court found implementation of an election provision in effect prior to November 1, 1964, to constitute a change requiring preclearance under the Voting Rights Act, a change in election procedure passed prior to the Act but effective after the Act would constitute a change within the meaning of the Act. Consequently, the State's argument that no preclearance was necessary for the complained of sections must fail.

The State's second argument is that the provisions complained of have been repealed and are no longer in effect. The State contends that §34-1002 of the 1964 election code was stricken in 1970 by Ga. Laws 1970, pp. 347, 354, and §34-1514 was stricken by Ga. Laws 1969, pp. 292, 293. While an examination of the pages cited in the laws of 1969 and 1970 reveals that the sections complained of have indeed been amended and, in fact, have section numbers different from the numbers assigned these provisions in the 1964 election code, the fact remains that in substance there has been no change in the requirement that candidates seeking party nomination for or election to the governing authority of a county shall be elected

by majority vote and shall, in case of a candidate seeking one of two or more public offices each having the same title and to be filled at the same election by the vote of the same electors, designate the specific office sought. See Ga. Laws 1964 at 174-75; Ga. Laws 1969 at 306-07; Ga. Laws 1970 at 380-81; Ga. Laws 1971 at 603-04 to trace the development of §34-1514. See Ga. Laws 1964 at 80; Ga. Laws 1970 at 369 to trace the development of §34-1002. Inasmuch as the changes complained of--the post-November 1, 1964, application of majority vote and designated office to candidates for nomination or election to the governing authority of a county--are still in effect, the State's argument that the sections complained of have been repealed must fail.

The State's final argument on behalf of its motion for summary judgment is that there has been no violation of section 5 of the Voting Rights Act of 1965 inasmuch as the complained of sections have, in fact, been precleared by the Attorney General of the United States. The reasoning behind this argument is that since after implementation of the change in

voting procedure complained of the Attorney General had occasion to consider the election code of Georgia in 1968, 1969, 1970, and 1971, he could have discovered that the complained of provisions had taken effect with regard to candidates for governing office of a county after November 1, 1964. Since the Attorney General could have discovered the change and objected to it, the State concludes that the fact that he did not object signifies that the change was approved. Central to the question of whether the provisions complained of have, in fact, been precleared is a determination of what constitutes a "submission" of a change within the meaning of the Voting Rights Act of 1965. Prior to September, 1971, there were no regulations specifying the proper manner in which a submission should be made. However, in Allen v. State Board of Elections, 393 U.S. 544 (1969), the Supreme Court discussed the meaning of a "submission" as follows:

> While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the

> Attorney General constituted a "submission." A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation directly to the Attorney General with a request for his consideration pursuant to the Act.

Id. at 571.

The entire election code of Georgia has been before the Attorney General on four occasions since 1965: in 1968, 1969, 1970, and 1971. The State argues that the Attorney General's access to the entire election code, which contained the changes complained of, but without their being specifically pointed out, constituted an effective submission of these provisions. The State relies upon the 1970 submission as particularly compelling. In 1970 the State requested review of the entire election code, which had been revised to place political primaries under the supervision of elected county and state officials. The language of this 1970 submission is interesting: "The Bill revises the Election Code in all respects to reflect this intention, together with certain other minor housekeeping changes which are self-explanatory." This clearly indicates

that the election code should be reviewed in its entirety.

In the absence of any requirement that a specific submission procedure be followed, this court finds that the submission of the entire election code of Georgia to the Attorney General with the request that he consider any changes constituted a submission of the matter to the Attorney General in an unambiguous and recordable manner as required by Allen. That the Attorney General was, in fact, aware of and had no objections to the two provisions complained of is strongly indicated by a letter which was not brought to the court's attention prior to the oral hearing. In this letter of March 30, 1973, designated as exhibit G of stipulations of fact, Stanley Pottinger, Assistant Attorney General, Civil Rights Division, assured the Ordinary of Harris County that the designated post requirement specified in §34-1015 of the Georgia Election Code, which was identical to former §34-1002 of the 1964 Election Code, had been submitted to the Attorney General in 1970 and that no objection had been interposed. That the majority vote provision had also been precleared is indicated by the decision

of the United States Court of Appeals for the Fifth Circuit in Pitts v. Cates, 536 F.2d 56 (5th Cir. 1976), in which it is clear that the court considered that provision as precleared by the Justice Department in 1970. Thus, there is evidence of general acceptance of the fact that both of the provisions complained of were in fact precleared in 1970.

Although arguments of waiver and estoppel have been abandoned by the State, the court is constrained to note that the Attorney General's delay of eleven years in bringing an action for declaratory and injunctive relief to force the State to submit the complained of provisions to a preclearance procedure is inexcusable and, if allowed, would have placed the electoral system of the state of Georgia in un uproar on the eve of a general election. For the Justice Department to attack provisions of the Georgia Election Code which have been in effect for eleven years on the sole basis that said provisions have not been precleared and with no allegations that these provisions are in any manner violative of the letter or the spirit of the fifteenth amendment to the

United States Constitution borders on the absurd.

Judgment shall be entered for the defendants.

IT IS SO ORDERED this 30th day of September, 1977.

s/JAMES C. HILL
United States Circuit Judge

s/CHARLES A. MOYE, JR.
United States District Judge

s/WILLIAM C. O'KELLEY
United States District Judge

Supreme Court, U. S.
FILED
NOV 2 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

NO. 78-523

WILLIE BAILEY, et al.,

Appellants,

vs.

J. CLAYTON HARGROVE, etc., et al.,

Appellees.

SUPPLEMENT TO JURISDICTIONAL STATEMENT

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ATTORNEYS FOR APPELLANTS

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

NO. 78-523

WILLIE BAILEY, et al.,

Appellants,

vs.

J. CLAYTON HARGROVE, etc., et al.,

Appellees.

SUPPLEMENT TO
JURISDICTIONAL STATEMENT

In appellants' Jurisdictional Statement, p. 3, it is stated that notice of appeal in this case was filed on July 28, 1978. The notice of appeal was filed by mail and at the time the Jurisdictional Statement was prepared, the undersigned was under the impression that July 28, 1978 was the date on which the notice of appeal was filed in the district court. It has since come to the attention of the undersigned that this date is incorrect,

and that as shown by Exhibit 1 hereto, the notice of appeal was filed on July 26, 1978.[1]

At the time the Jurisdictional Statement was prepared, the undersigned, pursuant to Rule 13(1) of this Court and based upon the above-mentioned incorrect belief concerning the date of the filing of the notice of appeal, calculated that appellants had until September 26, 1978 to docket their appeal. The appeal was docketed on that date. It is now clear that pursuant to Rule 13(1) this appeal should have been docketed on September 25, 1978 and thus this appeal was docketed out of time by one day.

Appellants request that this appeal not be dismissed for failure to comply with Rule 13(1) for several reasons. First, the undersigned's failure to comply

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1. After the Jurisdictional Statement was filed, the Clerk's office of this Court requested that a copy of the notice of appeal as filed in the district court be forwarded to this Court. The jurisdictional statement appendix included only a typed facsimile of the notice. It was only when counsel requested and received a copy of the notice from the district court that the error as to the date was discovered.

with Rule 13(1) does not constitute a jurisdictional defect. Communist Party v. Whitcomb, 414 U.S. 441, 445 n. 4 (1974); Johnson v. Florida, 391 U.S. 596, 598 (1968). Therefore, this Court has the authority to hear this appeal, notwithstanding the fact that it was filed out of time by one day.

Second, the docketing on September 26 rather than September 25 was not the result of intentional tardiness or neglect. Instead, it was the result of the undersigned's mistaken impression concerning the date on which the notice of appeal reached the district court. Cf. Pittsburg Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966).

Third, it is submitted that the purpose underlying the time limitations in 28 U.S.C. §2101 and Rule 13(1) should be considered by this Court in determining whether to dismiss this appeal. Time limitations of this sort were provided so that appeals can be disposed in an expeditious manner. In this regard, it should be noted that pursuant to 28 U.S.C. §2101(b), appellants had until August 28, 1978 to file their notice of appeal. Had this full sixty (60) days been used, the appeal would not have

been required to be docketed in this Court until October 27, 1978. Therefore, though the docketing of this appeal out of time was in violation of Rule 13(1), the violation in the context of this case is not the type of violation that has the result of protracting the litigation beyond the time periods contemplated by 28 U.S.C. §2101(b) and Rule 13(1).

For the foregoing reasons appellants respectfully request that this Court take notice of the correct date on which the notice of appeal was filed and that the Court not dismiss this appeal because it was filed out of time by one day.

Respectfully submitted,

s/Christopher Coates

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FILED
at 9:12 A.M.
JUL 26 1978
Clerk, U.S. District Court
Middle District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIE BAILEY, et al.,

Plaintiffs,

v.

ROY L. VINING, JR., etc., et al.,

Defendants.

Civil Action No. 76-199-MAC.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs appeal to the Supreme Court of the United States from the portion of the order entered by the district court in this action on June 28, 1978, which held that the local constitutional amendment to the 1945 Georgia Constitution found at Ga.Law 1962, p. 776, is not a change in election standards, practices or procedures covered by the pre-clearance requirements of 42 U.S.C. §1973c.

This appeal is taken pursuant to 42 U.S.C. §1973c.

Respectively submitted,

Christopher Coates

s/ Christopher Coates
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COUNSEL FOR PLAINTIFFS

Exhibit 1

Supreme Court, U. S.
FILED
DEC 11 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-523

WILLIE BAILEY, et al.,

Appellants,

v.

J. CLAYTON HARGROVE, etc., et al.,

Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION TO DISMISS and/or AFFIRM

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ATTORNEYS FOR APPELLEES

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-523

WILLIE BAILEY, ROBERT HARGROVE, GEORGE W. THOMPKINS, and WALTER DANIEL, individually and on behalf of all those similarly situated,

Appellants,

versus

J. CLAYTON HARGROVE, individually and in his official capacity as Judge of the Probate Court of Putnam County; JEFF A. MADDOX, JR., BETTY HARPER, AMELIA LOGAN, ANDREW SADDLER, and FRANK J. CARNES, individually and in their official capcities as members of the Putnam County Board of Education,

Appellees.

MOTION TO DISMISS and/or AFFIRM

Appellees file this Motion to Dismiss or in the alternative a Motion to Affirm the Order of the United States District Court for the Middle District of Georgia entered June 28, 1978 holding Ga. Laws 1962, p. 776 not subject to preclearance of §5 of the Voting Rights Act of 1965 because Ga. Laws 1962, p. 776 had been enacted, ratified, implemented, utilized, and was in "force and effect" prior to November 1, 1964.

OPINION BELOW

The June 28, 1978 opinion of the United States District Court for the Middle District of Georgia is unreported and is appended hereto at 1a. (Page 6a of Appellants' Jurisidictional Statement is not part of the District Court Order).

JURISDICTION

On June 28, 1978 the United States District Court for the Middle District of Georgia held that Georgia Laws 1962, p. 776 was "in force or effect" on November 1, 1964 and was not covered by §5 of the Voting Rights Act of 1965 requiring preclearance.

The jurisidiction of this Court is conferred by 28 U.S.C. §1253 and 42 U.S.C. §1973c.

Appellants' Notice of Appeal was filed July 26, 1978 and is appended hereto at 13a.

Appellants' case was docketed in this Court on September 26, 1978. Notice of Docketing is appended hereto at 14a.

Rule 13(1) of this Court provides:

> Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph

> 2 of this rule, except that in the case of appeals pursuant to Section 1252, 1253, or 2282 of Title 28 of the United States Code the time limit for docketing shall be sixty days from the filing of the notice of appeal. For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored. (Emphasis added).

Appellants' Notice of Appeal was filed July 26, 1978. (13a) The sixty day time limit on docketing was September 25, 1978. This case was docketed September 26, 1978. (14a). No application for extension of time was requested or granted.

Appeals not docketed in time are inoperative. Radford v. Folsom, 123 U.S. 725. Time limitations on appeal are for the purpose of setting a definite time when litigation shall be at an end. Matton Steamboat Co. v. Murphy, 319 U.S. 412. The noncompliance of time limita-

tions on appeal is to advise appellees they are free from appellants' demand. Id.

For this reason Appellees filed no response to Appellants' Jurisidictional Statement until requested by the Court. (21a).

Appellants' mistake as to the time within which the appeal was to be perfected is not a valid excuse for failure to file within the time prescribed. Richardson v. Green, 130 U.S. 104. Appellant was mistaken as to the last day this case could be docketed. (Appellants' Supplement to Jurisdictional Statement, pp. 1-2).

A case is to be docketed within the time allowed or it will be dismissed. Green v. Elbert, 137 U.S. 615.

STATUTES INVOLVED

The pertinent statutes involved on this appeal are Georgia Laws 1962, p. 776, and 42 U.S.C. 1973c appended hereto at 15a and

22a respectively.

QUESTION PRESENTED

Was Ga. Laws 1962, p. 776 not subject to preclearance of §5 of the Voting Rights Act of 1965.

STATEMENT OF THE CASE

Article VIII, Sec. 5, Para. 1, of the 1945 Constitution of the State of Georgia provided that boards of education would be selected by the grand jury. Paragraph 2 of the same article and section provided that the manner of selecting members of a board of education could be changed by a local constitutional amendment if ratified by a majority of the registered voters of the jurisdiction in a referendum vote.

Ga. Laws 1962, p. 776 is a local constitutional amendment that changed the method of selection of the Putnam County Board of Education from appointment by the grand jury to election by the people.

Georgia Laws 1962, p. 776 was enacted by the Georgia Legislature in March of 1962. It was ratified by the voters of Putnam County, Georgia on November 6, 1962. It became law and part of the Constitution of the State of Georgia on November 6, 1962 when ratified by the electorate. The effective date of Ga. Laws 1962, p. 776 is stated in the body of the law thereto:

> If such amendment shall be ratified as provided in said Paragraph of the Constitution, it shall become a part of the Constitution of this State. (19a).

Next, candidates qualified for the Primary Election under Ga. Laws 1962, p. 776. This occurred between January 18 and February 1, 1964. The first election utilizing Ga. Laws 1962, p. 776 was March 4, 1964 in the Democratic Primary where the electorate voted for the candidates qualified under Ga. Laws 1962, p. 776. A Primary Election run-off was held March 24, 1964.

Candidates again qualified for the General Election prior to November 1, 1964 and under Ga. Laws 1962, p. 776. The third election under Ga. Laws 1962, p. 776 was the November General Election. Thereafter Ga. Laws 1962, p. 776 has been utilized.

On June 28, 1978 the District Court ruled that Ga. Laws 1962, p. 776 was not subject to preclearance of §5 of the Voting Rights Act of 1965 because it was in "force and effect" by having been enacted, ratified and utilized prior to November 1, 1964.

Appellants' Notice of Appeal was filed July 26, 1978. This case was docketed September 26, 1976, sixty-one days after notice of appeal and contra to Rule 13(1) of this Court and 28 U.S.C. §2101 which require docketing within sixty days.

THE QUESTION IS NOT SUBSTANTIAL

I. PERKINS V. MATTHEWS, 400 U.S. 379 WAS CORRECTLY CONSTRUED BY THE DISTRICT COURT

The rule of Perkins v. Matthews, 400 U.S. 379 determines coverage questions of §5's preclearance; however, Perkins is not controlling in this case and is distinguishable.

The Perkins rule states:

> In our view, §5's reference to procedure "in force or effect on November 1, 1964" must be taken to mean the procedure that would have been followed if the election had been held on that date. Id. 400 U.S. at 394.

In Perkins the change from ward to at-large elections was enacted by statute in 1962. The change in election procedure was not utilized at the next regular election in 1965. Not until 1969 was the new statute utilized. In Perkins the officials failed to utilize the 1962 statute until after November 1, 1964.

In the present case Ga. Laws 1962, p. 776 was used prior to November 1, 1964. It was first used when candidates qualified for the March 1964 Primary Election. Qualification had to be at least 30 days before the Primary Election date. (Ga. Laws 1922, p. 98).

The second utilization of Ga. Laws 1962, p. 776 was the March 1964 Primary Election. Georgia's Primary Elections are ballot elections where the electorate of a party vote for candidates of their choice. The third utilization was the Primary Election run-off. The fourth utilization was qualifying for the General Election. This qualification had to be at least 45 days prior to the November 3, 1964 General Election. (Ga. Laws 1922, p. 100).

In the present case Ga. Laws 1962, p. 776 was "in force or effect" on November 1, 1964; thus, Perkins is distinguishable and preclearance is not required under §5.

Furthermore, Perkins states:

> Ordinarily we presume that officials will act in accordance with law. See First National Bank of Albuquerque v. Albright, 208 U.S. 548, 553, 28 S. Ct. 349, 350, 52, L.Ed. 614 (1908). If the only available facts showed that Canton conducted its 1961 election by wards but that the Mississippi Legislature had subsequently enacted a statute in 1962 requiring future municipal elections to be held at large, Canton officials would be entitled to the weight of that presumption.

The facts in the present case show that prior to Ga. Laws 1962, p. 776 the board of education was appointed by the grand jury but subsequently, the statute of 1962 required election of those members. Therefore, as stated in Perkins it is presumed that the Putnam County officials acted in accordance with the law and utilized the 1962 statute prior to November 1, 1964.

Implementing, utilizing and putting "into force or effect" Ga. Laws 1962, p. 776 required more than the mere act of having the statute used in the General Election

on November 3, 1964. It required the preliminaries of qualifying and holding a primary for the elected positions set forth in Ga. Laws 1962, p. 776. This was done in the present case.

Appellant contends a law cannot be "in force and effect" until it is used in the 1964 General Election. Appellant disregards the utilization of the law prior to the General Election where it was utilized and enforced by the qualifying and by the holding of a Primary Election.

Appellants concede that the District Court was correct that if the General Election had been held November 1, 1964, Ga. Laws 1962, p. 776 would have governed the election of members of the Putnam County Board of Education. (Appellants Jurisdictional Statement p. 8).

The Perkins test clearly states that "in force or effect on November 1, 1964" must be taken to mean the procedure that would have

been followed if the election had been held on that date.

Appellant contends Georgia law restricts the holding of a General Election prior to November 2, 1964. First, the Georgia legislature could have changed the date of the General Election. "If" the election had been held on or before November 1, 1964 then Ga. Laws 1962, p. 776 would have been employed since qualifying and preliminary primaries had been held under Ga. Laws 1962, p. 776 prior to November 1, 1964.

Next, Ga. Laws 1962, p. 776 states the officials shall be elected at the General Election held in 1964. It is not restricted to a November election.

Ga. Laws 1964, p. 26 defines "General Election" and "November Election" separate. Had the Georgia legislature intended "November Election" they would have so stated.

The Perkins test is clear that when the statute in question would have been

followed if the election was on November 1, 1964 §5's preclearance is not applicable. The District Court was correct in that Ga. Laws 1962 p. 776 was "in force or effect" prior to November 1, 1964. It was effective because of enactment, effective because of ratification, effective because of qualifying and effective because of a Primary Election - all of which occurred prior to November 1, 1964.

II. THE INTENT OF CONGRESS AS TO §5 OF THE VOTING RIGHTS ACT OF 1965.

The District Court's ruling was in accord with the intent of Congress as to §5 of the Voting Rights Act of 1965.

The Appellants narrow interpretation of Perkins and the phrase "in force or effect" would mean any law used in a general election" for the first time in 1964 is not "in force" irrespective of the fact that the law had been used in previous elections but not general elections.

42 U.S.C. 1973(c) states:

> Whenever a state or political subdivision... shall enact or seek to administer any... [election change]... different from that in force or effect on November 1, 1964...

Congress did not declare any change used in a general election for the first time in 1964 to be subject to §5 preclearance.

Determining whether a change is within the purview of §5 it was the intent of Congress that "the change" have a potential of discrimination. Perkins states §5 was designed to cover changes having a potential of racial discrimination. Id. at 388. A change from grand jury selection to election by the people, Ga. Laws 1962, p. 776, has no potential for racial discrimination and would not be subject to §5 preclearance.

III. THE DISTRICT COURT'S RULING DOES NOT CONFLICT WITH UNITED STATES V. GEORGIA.

United States v. Georgia, Civil No. C76-1531A (N.D. Ga. September 30, 1977), aff'd ___ U.S. _____, 98 S. Ct. 2840 (1978) appended at 27a challenged Ga. Laws, 1964 Extra Sess. pp. 26, 89 and Ga. Laws 1964 Extra Sess. pp. 26, 175. Both laws specifically state they will not be effective until January 1, 1965.

> The provisions of this section shall not apply to candidates seeking party nomination for or election to the governing authority of a county during the year 1964, and such candidates shall be governed in accordance with any local act establishing such governing authority in the case of said election; and this sentence shall be automatically repealed effective January 1, 1965.

The United States v. Georgia, id. decision was based upon the fact that the laws were not utilized until after January 1, 1965. The State of Georgia had sought exemption of §5 preclearance merely because the statutes

had been enacted by the legislature prior to November 1, 1964.

In the present case Ga. Laws 1962, p. 776, was not restricted to being utilized until after November 1, 1964 and was in fact utilized prior to November 1, 1964.

CONCLUSION

For the foregoing reasons this Court should dismiss this appeal or in the alternative affirm the District Court.

Respectfully submitted,

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JESSE COPELAN, JR.
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ATTORNEYS FOR APPELLEES

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIE BAILEY, ET AL.,	:	
Plaintiffs	:	
vs.	:	CIVIL ACTION
ROY L. VINING, JR., individually and in their capacity as members of the Board of Commissioners for Putnam County, Georgia, et al.,	:	NO. 76-199-MAC
Defendants	:	[Filed June 28, 1978]

Before MORGAN, Circuit Judge, BOOTLE, Senior District Judge, and OWENS, District Judge.

OWENS, District Judge:

The court having determined that no factual issues as to questions to be decided by this court of three judges are in dispute and

having considered the evidence, briefs and argument of counsel does hereby dispose of all three judge issues as follows:

I. THE PUTNAM COUNTY BOARD OF EDUCATION

The 1945 Constitution of the State of Georgia was amended by an act of the legislature, 1962 Ga. Laws, p. 776, ratified by the voters of the entire state [sic; Putnam County] in November 1962, to provide for a publicly elected board of education to take the place of a board of education whose members were appointed by the grand jury. Petitioners urge that since the first [sic; third] election of these school board members did not take place until after November 1, 1964, this constitutional amendment was covered by the Voting Rights Act and cannot be futher utilized until the Voting Rights Act is complied with. Defendants to the contrary

say that the procedure of electing rather than appointing this board of education was in force and effect on November 1, 1964, and the election of November 1966 [sic; November 3, 1964] -- the first [sic; third] election under the Act -- is not a change. Accordingly, they say this amendment is not covered by the Voting Rights Act.

Title 42 U.S.C.A. §1973c, the Voting Rights Act, provides:

> "Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote for failure to comply

> with such qualification, prerequisite, standard, practice or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." (emphasis added)

The words "any action under this section shall be heard and determined by a court of three judges..." have been construed to mean that a court of three judges must determine whether or not a particular amendment, law, standard, practice

or procedure is covered by the Voting Rights Act. The further question of whether or not a covered amendment, law, standard, practice or procedure "does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color'..." is expressly reserved for decision by the Attorney General or the United States District Court for the District of Columbia. Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L. Ed. 2d. 476 (1971).

The Supreme Court in Perkins v. Matthews, supra, considered whether or not a Mississippi statute enacted in 1962 to change municipal elections from ward to at-large which was ignored by the City of Canton in conducting its 1965 elections had to be submitted by the City of Canton to be used for election in 1969 and subsequent years. Note what the court said:

"We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under §5. That section in express terms reaches any standard, practice, or procedure 'different from that in force or effect on November 1, 1964.' In our view §5's reference to the procedure 'in force or effect on November 1, 1964,' must be taken to mean the procedure that would have been followed if the election had been held on that date. That judgment is necessarily a matter of inference in this case since Canton did not hold a municipal election on November 1, 1964. But in drawing that inference, there is little reason to blind ourselves to relevant evidence in the record by restricting our gaze to events that occurred before that date. Ordinarily we presume that officials will act in accordance with law. See First National Bank of Alburquerque v. Albright, 208 U.S. 548, 553, 52 L.Ed. 614, 616, 28 S.Ct. 349 (1908). If the only available facts showed that Canton conducted its 1961 election by wards but that the Mississippi Legislature had subsequently enacted a statute in 1962 requiring future municipal elections to be held at large, Canton officials would be entitled to the weight of that presumption.

"With the benefit of hindsight, however, we know that Canton elected its aldermen by wards in its June 1965 municipal election. The record reflectes no relevant change between November 1964 and June 1965 to suggest

that a different procedure would have been in effect if the elections had been held seven months earlier. Consequently, we conclude that the procedure in fact 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards. That sufficed to bring the 1969 change within §5. As was the case in Allen, 'it is clear, however, that the new procedure with respect to voting is different from the procedure in effect when...[Canton] became subject to the Act...' 393 U.S., at 570, 22 L.Ed.2d. at 19. The bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide." 400 U.S. at 394, 27 L.Ed.2d. at 488, 91 S. Ct. at__.

The amendment providing for the election of this board of education after its enactment by the legislature in 1962 and its ratification by the voters in November 1962, was complete in every respect, and the first [sic; third] election was then scheduled for November 1964 on the Tuesday following the first Monday. If that election had been held a few days earlier on November 1, it would have been held pursuant to this amendment and the same way it was actually held that

November on the Tuesday following the first Monday. The procedures "in force or effect" in Terrell County [sic; Putnam County] on November 1, 1964, was to thus elect this board of education pursuant to this amendment. The amendment having thus been "in force or effect" on November 1, 1964, it is not covered by the Voting Rights Act.

The legislature in 1972, by 1972 Ga. Laws, p. 2678, provided for staggered terms for members of the board of education with three members to be elected in 1972 for four year terms, two members to be elected in 1974 for two year terms and their successors to be elected on November of the last year of their respective terms. This law has not been submitted to the Attorney General or the District Court for the District of Columbia pursuant to the Voting Rights Act. Since any

change different from that "in force or effect" on November 1, 1964, must be submitted, Allen v. Board of Elections, 393 U.S. 544 (1969), and if not submitted may not be used, this court must enjoin further use unless and until the Voting Rights Act is complied with. An election is scheduled for November 1978. The parties are invited to immediately and not later than fifteen (15) days submit their suggestions as to an appropriate remedy.

II. THE CITY OF EATONTON.

1970 Ga. Laws, p. 2945; 1972 Ga. Laws, p. 3833; 1976 Ga. Laws, p. 3305, effected corporate annexations for the city. 1977 Ga. Laws, p. 3236, changed the number of aldermen, their terms of office and method of election. These all constitute changes subject to the Voting Rights Act which have not been submitted to the Attorney General or the District Court for the District of Columbia. Further use of these laws until the Voting Rights Act is complied with must

be enjoined.

III. EATONTON TAX ASSESSORS.

1970 Ga. Laws, p. 2945, provided for an appointed Board of Tax Assessors. Until the passage of that law the tax assessors were publicly elected. 1908 Ga. Laws, p. 620, abolishing the right of all citizens to elect these officials does in this court's considered judgment constitute a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting...." 42 U.S.C. §1973c. This considered judgment is founded upon Allen v. Board of Elections, 393 U.S. 544, 569, to wit:

> "In No. 26 an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however the purpose of §5 was to submit such changes to scrutiny."

This law has not been submitted to the Attorney General or the District Court for the District of Columbia pursuant to the Voting Rights Act.

IV. GEORGIA ELECTION CODE PROVISIONS

Petitioners contentions that §§34-1002 and 34-1514 of the Georgia Election Code are unenforceable because of failure to comply with the Voting Rights Act have been decided adversely to petitioners. United States v. Georgia, Civil No. 76-153A, U.S. District Court for the Northern District of Georgia, affirmed without opinion, __U.S. ___, 46 U.S.L.W. 3750 (June 5, 1978).

Accordingly the parties to this action, their officers, agents, servants, employees, and attorneys, and all persons receiving actual notice of this order are hereby enjoined from directly or indirectly utilizing each of the statutes herein found to be covered by the Voting Rights

Act and to have not been cleared pursuant to the Voting Rights Act, all until such time as the Voting Rights Act has been complied with.

Upon hearing from the parties the court will consider what further remedial action must be ordered as to 1972 Ga. Laws 2678 providing for staggered terms for the board of education.

SO ORDERED, this the 28th day of June, 1978.

s/ Lewis R. Morgan
United States Circuit Judge

s/ W. A. Bootle
United States District Judge

s/ Wilbur D. Owens, Jr.
United States District Judge

FILED
at 8:45 A.M.
JUL 26 1978
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIE BAILEY, et al.,
Plaintiffs,
v.
ROY L. VINING, JR., etc., et al.,
Defendants.

Civil Action No. 76-199-MAC.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs appeal to the Supreme Court of the United States from the portion of the order entered by the district court in this action on June 28, 1978, which held that the local constitutional amendment to the 1945 Georgia Constitution found at Ga.Law 1962, p. 776, is not a change in election standards, practices or procedures covered by the pre-clearance requirements of 42 U.S.C. §1973c.

This appeal is taken pursuant to 42 U.S.C. §1973c.

Respectively submitted,

s/ Christopher Coates
Christopher Coates
Laughlin McDonald
Neil Bradley
52 Fairlie Street, NW
Atlanta, Georgia 30303

COUNSEL FOR PLAINTIFFS

SUPREME COURT OF THE UNITED STATES

Willie Bailey, et al.
Appellant—Petitioner

vs.

C. Clayton Hargrove, etc. et al.
Appellee—Respondent

No. 78-523

To Jesse Copelan, Jr. Counsel for Appellee—Respondent:

You Are Hereby Notified that an appeal—~~a petition for a writ of certiorari~~—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 26 day of Sept. 19 78.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed by you, or other counsel who will represent your party, with the Clerk at or before the time you file your response to our petition or jurisdictional statement.

Only those counsel who file an appearance form can expect to receive notification of the Court's action(s) in this case.

Christopher Coates
Counsel for Appellant—Petitioner

52 Fairlie Street, NW
Number and Street

Atlanta, GA 30303
City, State and Zip Code

NOTE: Please indicate whether the case is an appeal or a petition for certiorari by crossing out the inapplicable terms. A copy of this notice should not be filed in the Supreme Court.

CO-79

PUTNAM COUNTY--BOARD OF EDUCATION

Proposed Amendment to the Constitution

No. 92 (House Resolution No. 260-701).

A Resolution.

Proposing an amendment to the Constitution so as to provide for the election of the members of the Board of Education of Putnam County by the people; to provide for the election of the Chairman of the Board of Education; to provide for the filling of vacancies on the Board; to provide for the submission of this amendment for rejection or ratification; and for other purposes.

Be it resolved by the General Assembly of Georgia:

Section 1. Article VIII, Section V, Paragraph I of the Constitution, relating to county boards of education, as amended, is hereby amended by adding at the end thereof the following:

"The Board of Education of Putnam County shall be composed of five (5) members.

The Chairman and the four (4) other members of the Board shall be elected by the voters of the entire county. The five (5) memberships on the Board shall be designated as post numbers 1 through 5 respectively. The individual elected to Post number 1 shall be the Chairman of the Board. Those candidates offering for election to the Board of Education of Putnam County shall specifically designate their intention of running for a particular post by number. To be elected to such post, the candidate must receive the highest number of votes cast and at the same time the candidate must receive a majority of the total votes cast toward filling such vacancy. Any vacancy occurring in the membership of the Board of Education of Putnam County, for any cause whatsoever, shall be filled by the majority vote of the remaining members of Board of Education.

"In the event this amendment is ratified, the members of the first Board of Education of Putnam County created under this amendment shall be elected at the general election held in 1964. The members elected at such election shall take office January 1, 1965, and shall serve for a term of four years and until their successors are elected and qualified. Future elections shall be held every four years at the same time as elections for members of the General Assembly are held and the members elected shall take office on the first day of January immediately following the election. All future members shall likewise serve for a term of four years and until their successors are elected and qualified.

"The Board of Education in Putnam County in existence at the time of ratification of this amendment is hereby abolished December 31, 1964, and the

terms of all members of such Board shall expire at that time.

"The Board of Education of Putnam County as provided for herein shall be subject to all constitutional and statutory provisions relative to county boards of education, unless such provisisions are in conflict with the provisions of this amendment."

Section 2. When the above proposed amendment to the Constitution shall have been agreed to by two-thirds of the members elected to each of the two branches of the General Assembly, and the same has been entered on their journals with the "Ayes" and "Nays" taken thereon, such proposed amendment shall be published and submitted as provided in Article XIII, Section I, Paragraph I of the Constitution of Georgia of 1945, as amended.

The ballot submitting the above proposed amendment shall have written or printed thereon the following:

"For ratification of amendment to the Constitution so as to provide for the election of members of the Board of Education of Putnam County by the people.

"Against ratification of amendment to the Constitution so as to provide for the election of members of the Board of Education of Putnam County by the people."

All persons desireing to vote in favor of adopting the proposed amendment shall vote for the ratification of the amendment, and all persons desiring to vote against the adoption of the proposed amendment shall vote against ratification.

If such amendment shall be ratified as provided in said Paragraph of the Constitution, it shall become a part of the Constitution of this State. The

returns of the election shall be made in like manner as returns for elections for members of the General Assembly, and it shall be the duty of the Secretary of State to ascertain the result and certify the result of the Governor, who shall issue his proclamation thereon.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 13, 1978

Jesse Copelan, Jr., Esq.
P. O. Box 109
Eatonton, Georgia 31024

Re: WILLIE BAILEY, ET AL. v. J. CLAYTON HARGROVE, ETC., ET AL., No. 78-523

Dear Mr. Copelan:

On September 26, 1978, an appeal in the above-entitled case was filed in this Court to review the judgment of the U. S. District Court for the Middle District of Georgia (No. CA 76-199-MAC), dated June 28, 1978.

The Court has directed this office to request that a response be filed in this case. The response in appeals normally takes the form of a motion to dismiss or affirm, as provided for in Rule 16 of the rules of this Court. Forty printed copies of the response, together with proof of service thereof, should reach thif office on or before December 13, 1978.

Very truly yours,

Michael Rodak, Jr.
Clerk

cc: H. Christopher Coates, Esq.
ACLUF, Inc.
52 Fairlie Street, N. W.
Atlanta, Georgia 30303

Wayne B. Bradley, Esq.
Stanford Building
Milledgeville, Georgia 31061

AIR MAIL

42 U.S.C. §1973c

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court.

Whenever a state or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this

title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon deterinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States

District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and

the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention

during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
vs.	:	CIVIL NO. C76-1531A
THE STATE OF GEORGIA, et al.	:	[Filed September 30, 1977]

Before HILL, Circuit Judge; MOYE and O'KELLEY, District Judges

ORDER

PER CURIAM

This civil action is before the court on defendants' motion to dismiss or, in the alternative, for summary judgment and on plaintiff's motion for summary judgment. The United States Justice Department on September 17, 1976, filed an action in this court seeking an order requiring the State to submit two provisions of the Georgia Election Code of 1964 to the Attorney General of the United States for clearance pursuant to the Voting Rights Act of 1965, 42 U.S.C. §1971 et

seq. The case was submitted to a three-judge panel, which determined that ruling should be postponed until after the general election and that a ruling should be made based on cross motions for summary judgment. The case was set down for oral argument on April 28, 1977, and heard by the court at that time.

In the spring of 1964, the Georgia General Assembly in an extraordinary session completely revised the Georgia Election Code. The resulting bill, Act. No. 26, Ga. Laws 1964, p. 26 (Ga. Code Ann. 34-101 et seq.), was signed by the governor on June 24, 1964. The new election code provided at §34-1002 that candidates seeking one of two or more public offices, each having the same title and to be filled at the same election by vote of the same electors, would have to designate which specific office

and post they were seeking within a given district. At §34-1514 the new code provided that a majority vote was required to nominate or elect in all elections within the purview of the election code. These two provisions contained a sentence which excluded candidates for election to the governing authority of a county from the requirement of designating a post and district and from the requirement of majority vote for the year 1964.

The Voting Rights Act of 1965, 42 U.S.C. §1971 et seq. [sic] became effective in August, 1965. The Act provided that in certain states and political subdivisions any change in the voting standard, function, or procedure after November, 1964, must be cleared by approval of the District Court for the District of Columbia or the Attorney General of the United States prior to its being put into effect. Georgia is a state covered by the Act. In the case sub judice, the Justice Department contends

that the provisions in question, former Ga. Code Ann. §34-1002 and former Ga. Code Ann. §34-1514, were subject to the pre-clearance provisions of the Voting Rights Act of 1965 in that they constituted a change in voting procedure within the meaning of the Act. This reasoning is based on the argument that since these provisions of the Georgia Election Code did not go into effect until after November, 1964, they are subject to the Act even though the Georgia Election Code of which they are a part was enacted prior to the Voting Rights Act. The United States requests that the court declare that implementation of the changes to majority vote and designated posts in primaries and elections for county governing bodies violates section 5 of the Voting Rights Act of 1965 and that the court enjoin defendants from emplementing [sic] the

changes until the requirements of section 5 have been satisfied.

The State's motion to dismiss or, in the alternative, for summary judgment is based on three main arguments: (1) that the voting practices complained of were in force prior to November 1, 1964, and, consequently, not required to be sumitted to the District Court for the District of Columbia or the Attorney General of the United States for approval prior to implementation; (2) that the provisions complained of have been repealed; and (3) that the provisions complained of were, in fact, properly submitted and approved by the Attorney General.

The argument that the provisions at issue did not constitute changes within the meaning of the Voting Rights Act in that they were part of an election code enacted prior to the passage of the

Voting Rights Act has been dealt with by the Supreme Court of the United States in Perkins v. Matthews, 400 U.S. 379 (1971), in a slightly different factual setting. In Perkins the appellants, voters and candidates for city office, sought to enjoin the 1969 city election in Canton, Mississippi, on the grounds that changes in election procedure and certain boundary changes since November, 1964, had not been precleared. Among the changes complainted of was a change from election by ward to at-large election of aldermen. As the Court noted, the question of a change in this instance arose in a "peculiar context." The change had been enacted by a Mississippi statute of 1962 but had been ignored by the city in the election of 1965. The Court found that a belated implementation of the at-large election of aldermen requirement in the 1969 election would constitute a change

within the meaning of the Voting Rights Act of 1965:

> We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under §5. That section in express terms reaches any standard, practice or procedure "different from that in force or effect on November 1, 1964." In our view, §5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date.

Id. at 394. It seems clear that if the Court found implementation of an election provision in effect prior to November 1, 1964, to constitute a change requiring preclearance under the Voting Rights Act, a change in election procedure passed prior to the Act but effective after the Act would constitute a change within the meaning of the Act. Consequently, the State's argument that no preclearance was necessary for the complained of sections must fail.

The State's second argument is that the provisions complained of have been repealed and are no longer in effect. The State contends that §34-1002 of the 1964 election code was stricken in 1970 by Ga. Laws 1970, pp. 347, 354, and §34-1514 was stricken by Ga. Laws 1969, pp. 292, 293. While an examination of the pages cited in the laws of 1969 and 1970 reveals that the sections complained of have indeed been amended and, in fact, have section numbers different from the numbers assigned these provisions in the 1964 election code, the fact remains that in substance there has been no change in the requirement that candidates seeking party nomination for or election to the governing authority of a county shall be elected by majority vote and shall, in case of a candidate seeking one of two or more public offices each having the same title and to be filled at the same election by the

vote of the same electors, designate the specific office sought. See Ga. Laws 1964 at 174-75; Ga. Laws 1969 at 306-07; Ga. Laws 1970 at 380-81; Ga. Laws 1971 at 603-04 to trace the development of §34-1514. See Ga. Laws 1964 at 80; Ga. Laws 1970 at 369 to trace the development of §34-1002. Inasmuch as the changes complained of--the post-November 1, 1964, application of majority vote and designated office to candidates for nomination or election to the governing authority of a county--are still in effect, the State's argument that the sections complained of have been repealed must fail.

The State's final argument on behalf of its motion for summary judgment is that there has been no violation of section 5 of the Voting Rights Act of 1965 inasmuch as the complained of sections have, in fact, been precleared by the Attorney General of the United States. The reason-

ing behind this argument is that since after implementation of the change in voting procedure complained of the Attorney General had occasion to consider the election code of Georgia in 1968, 1969, 1970, and 1971, he could have discovered that the complained of provisions had taken effect with regard to candidates for governing office of a county after November 1, 1964. Since the Attorney General could have discovered the change and objected to it, the State concludes that the fact that he did not object signifies that the change was approved. Central to the question of whether the provisions complained of have, in fact, been precleared is a determination of what constitutes a "submission" of a change within the meaning of the Voting Rights Act of 1965. Prior to September, 1971, there were no regulations specifying the proper manner in which a submission should be made. However, in Allen v.

State Board of Elections, 393 U.S. 544 (1969), the Supreme Court discussed the meaning of a "submission" as follows:

> While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a "submission." A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation directly to the Attorney General with a request for his consideration pursuant to the Act.

Id. at 571.

The entire election code of Georgia has been before the Attorney General on four occasions since 1965: in 1968, 1969, 1970, and 1971. The State argues that the Attorney General's access to the entire election code, which contained the changes complained of, but without their being specifically pointed out, constituted an

effective submission of these provisions. The State relies upon the 1970 submission as particularly compelling. In 1970 the State requested review of the entire election code, which had been revised to place political primaries under the supervision of elected county and state officials. The language of this 1970 submission is interesting: "The Bill revises the Election Code in all respects to reflect this intention, together with certain other minor housekeeping changes which are self-explanatory." This clearly indicates that the election code should be reviewed in its entirety.

In the absence of any requirement that a specific submission procedure be followed, this court finds that the submission of the entire election code of Georgia to the Attorney General with the request that he consider any changes constituted a submission of the matter to the Attorney General in an unambiguous and recordable

manner as required by Allen. That the Attorney General was, in fact, aware of and had no objections to the two provisions complained of is strongly indicated by a letter which was not brought to the court's attention prior to the oral hearing. In this letter of March 30, 1973, designated as exhibit G of stipulations of fact, Stanley Pottinger, Assistant Attorney General, Civil Rights Division, assured the Ordinary of Harris County that the designated post requirement specified in §34-1015 of the Georgia Election Code, which was identical to former §34-1002 of the 1964 Election Code, had been submitted to the Attorney General in 1970 and that no objection had been interposed. That the majority vote provision had also been precleared is indicated by the decision of the United States Court of Appeals for the Fifth Circuit in Pitts v. Cates, 536 F.2d. 56 (5th Cir. 1976), in which it

is clear that the court considered that provision as precleared by the Justice Department in 1970. Thus, there is evidence of general acceptance of the fact that both of the provisions complained of were in fact precleared in 1970.

Although arguments of waiver and estoppel have been abandoned by the State, the court is constrained to note that the Attorney General's delay of eleven years in bringing an action for declaratory and injunctive relief to force the State to submit the complained of provisions to a preclearance procedure is inexcusable and, if allowed, would have placed the electoral system of the State of Georgia in an uproar on the eve of a general election. For the Justice Department to attack provisions of the Georgia Election Code which have been in effect for eleven years on the sole basis that said provisions have not been precleared and with no allegations that these provisions are in

any manner violative of the letter or the spirit of the fifteenth amendment to the United States Constitution borders on the absurd.

Judgement shall be entered for the defendants.

IT IS SO ORDERED this 30th day of September, 1977.

s/JAMES C. HILL
United States Circuit Judge

s/CHARLES A. MOYE, JR.
United States District Judge

s/WILLIAM C. O'KELLEY
United States District Judge

Supreme Court, U. S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

NO. 78-523

WILLIE BAILEY, et al.,

Appellants,

v.

J. CLAYTON HARGROVE, etc., et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

APPELLANTS' REPLY TO APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

CHRISTOPHER COATES
LAUGHLIN McDONALD
NEIL BRADLEY
52 Fairlie Street, NW
Atlanta, Georgia 30303

ATTORNEYS FOR APPELLANTS

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I. GEORGIA LAWS 1962, P. 776 WAS NOT UTILIZED PRIOR TO NOVEMBER 3, 1964 AND THE RULING OF THE DISTRICT COURT IS NOT TO THE CONTRARY.

The district court ruling that Georgia Laws 1962, p. 776 was not covered by the Voting Rights Act of 1965 was

premised on the speculation, drawn by inference, that if the general election had been held on November 1, 1964, the local act at issue would have been employed. (Apppellees' Appendix, pp. 7a-8a). Appellees' main argument in their Motion to Dismiss and/or Affirm is not the reasoning adopted by the district court, but the contention that Georgia Laws 1962, p. 776 was utilized prior to November 1, 1964. To support this argument, Appellees claim that Georgia Laws 1962, p. 776 was utilized: (1) when candidates for the Board of Education qualified in January and February, 1964 for a primary election; (2) when a primary election and primary election runoff were held in March, 1964; and (3) when candidates qualified in September, 1964 for the November 3, 1964 general election.[1]

1. In their memorandum in support of proposed order of Defendant Putnam County Board of Education, p. 1, Appellees before the district court claimed that a primary election for members of the Board of Education was held in March, 1964. However, Appellees did not argue below that the holding of this primary election constituted a utilization of Georgia Laws 1962, p. 776. Furthermore, Appellees make no mention of candidate qualification procedures for primary or general elections before the district court and did not argue below that such activities constituted utilizations of Georgia Laws 1962, p. 776.

(Appellees' Motion to Dismiss and/or Affirm, pp. 7-8, 10).

A. Georgia Laws 1962, p. 776 Did Not Provide for and Was Not Utilized in the Holding of Primary Elections or in Candidate Qualification.

Appellees are incorrect in claiming that Georgia Laws 1962, p. 776 was utilized in the holding of primary elections or in candidate qualification. A reading of the local act shows that it does not mention either procedure. Regarding the election for members of the Board of Education, Georgia Laws 1962, p. 776 provided only for the holding of the general election.

Appellees contend that the procedures for candidate qualification in 1964 for both the primary and general elections were provided by Georgia Laws 1922, pp. 98, 100. (Appellees' Motion to Dismiss and/or Affirm, p. 10). Therefore, Georgia Laws 1962, p. 776 was not utilized when primary elections were held in 1964 or when candidates qualified in 1964 for the primary and

general elections. Instead, Georgia Laws 1962, p. 776, which provided for the popular election of Board members for the first time on November 3, 1964, in effect triggered pre-existing statewide statutes that provided the procedures for candidate qualification and primary elections in all countywide races.

The election change at issue here, i.e., alteration from appointment to at-large election of local officials used for the first time on November 3, 1964, is manifestly the type of change Congress intended to subject to §5 scrutiny. This Court has repeatedly held that §5 is to be given "the broadest possible scope." Allen v. State Board of Elections, 393 U.S. 544, 567 (1969). Accord: Dougherty Cty., Ga. Bd. of Ed. v. White, ___U.S.___, 99 S.Ct. 368, 372 (1978).

It is submitted that it would be an unwarranted restriction upon the reach of §5 for an otherwise covered election change to be removed from the coverage of the Act on grounds that the election change in effect triggered other actions, pursuant to existing statewide statutes, which occurred prior to November 1, 1964. Therefore, Appellees' contention must fail.

B. The District Court Did Not Find that Georgia Laws 1962, p. 776 Was Utilized Prior to November 3, 1964.

The district court's ruling that Georgia Laws 1962, p. 776 was not covered by §5 was not premised on the theory that Georgia Laws 1962, p. 776 was utilized prior to November 1, 1964. A reading of the opinion shows that the district court did not mention the procedures for candidate qualification or the holding of primary elections. The fact that the district court characterized the November, 1964 general election as the "first election under the Act" (Appellees' Appendix, pp. 2a, 3a, 7a) clearly demonstrates that it did not view primary elections in March, 1964 to have utilized Georgia Laws 1962, p. 776.

Appellees attempt to make the district court opinion conform to their arguments on appeal in two ways. First, they state (Appellees' Motion to Dismiss and/or Affirm, p. 8) that the district court found the local act was not subject to §5 "by having been enacted, ratified and utilized prior to November 1, 1964."

(emphasis added). This contention is simply incorrect. Nowhere in its opinion did the district court find that Georgia Laws 1962, p. 776 was utilized prior to November 1, 1964.

Second, Appellees place "[sic; third]" at the three points in the district court opinion where the court referred to the November, 1964 general election as the "first election." (Appellees' Appendix, pp. 2a, 3a, 7a). It is submitted that this characterization by the district court was not in error, but in any event the district court meant what it said.[1]

CONCLUSION

For the foregoing reasons, Appellees' contention that Georgia Laws 1962, p. 776 was utilized prior to November 1, 1964, and therefore not within the coverage of §5 of the Voting Rights Act of 1965, is without merit.

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1. Moreover, the use of "[sic]" in this manner is inappropriate.

Respectfully submitted,

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